IN THE
SUPREME COURT OF MISSOURI

No. SC 86724

RONNOCO COFFEE COMPANY,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

On Petition for Review from the
Missouri Administrative Hearing Commission
Hon. June Streigel Doughty, Commissioner

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES

In *Brambles v. Director of Revenue*, 981 S.W.2d 568 (Mo. banc 1998), this Court held that the sales tax resale exclusion applied to leases of shipping pallets to Proctor & Gamble for resale in the form of subsequent transfer to and use by its customers that were buying products shipped on the pallets. In *Weather Guard, Inc. v. Director of Revenue*, 746 S.W.2d 657 (Mo. App. E.D. 1988), the Court of Appeals held that the use tax resale exclusion applied to the purchase of insulation blowing equipment by retailers who allowed their customers who bought insulation from those retailers to use the equipment to install that insulation. In each case, the court concluded that the requirement to buy products associated with the resold property provided the consideration for resale.

Ronnoco purchased certain coffee equipment the use of which it transfers to its customers as part of the consideration for continued purchases of Ronnoco's coffee products. The cost of the equipment is factored into the price that Ronnoco charges for its coffee products. Are those outright purchases of equipment purchases for resale?

STANDARD OF REVIEW

The decision of the Commission shall be upheld unless: (1) it is not authorized by law; (2) it is not supported by competent and substantial evidence upon the whole record; (3) a mandatory procedural safeguard was violated; or (4) it is clearly contrary to the Legislature's reasonable expectations. Section 621.193, RSMo 2000; *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186 (Mo. banc 1996). This Court's review of the law is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000).

Tax imposition statutes shall be strictly construed against the Director in favor of the taxpayer. Section 136.300.1, RSMo 2000; *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526, 529 (Mo. banc 2003).

POINT RELIED ON

THE COMMISSION DID NOT ERR IN CONCLUDING THAT RONNOCO PURCHASED THE COFFEE EQUIPMENT FOR RESALE BECAUSE, UNDER SECTION 621.189, THAT DECISION IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE RECORD, IS AUTHORIZED BY LAW, AND IS ENTIRELY CONSISTENT WITH THE REASONABLE EXPECTATIONS OF THE MISSOURI GENERAL ASSEMBLY, SINCE RONNOCO'S TRANSFER OF THE USE OF THE EQUIPMENT IS A "SALE" WITHIN THE MEANING OF SECTION 144.605(7).

Brambles v. Director of Revenue, 981 S.W.2d 568 (Mo. banc 1998);

Weather Guard, Inc. v. Director of Revenue, 746 S.W.2d 657 (Mo. App. E.D. 1988).

ARGUMENT

THE COMMISSION DID NOT ERR IN CONCLUDING THAT RONNOCO PURCHASED THE COFFEE EQUIPMENT FOR RESALE BECAUSE, UNDER SECTION 621.189, THAT DECISION IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE RECORD, IS AUTHORIZED BY LAW, AND IS ENTIRELY CONSISTENT WITH THE REASONABLE EXPECTATIONS OF THE MISSOURI GENERAL ASSEMBLY SINCE RONNOCO'S TRANSFER OF THE USE OF THE EQUIPMENT IS A "SALE" WITHIN THE MEANING OF SECTION 144.605(7).

1. Ronnoco's Purchases are for Resale Within the Meaning of the Tax Law

A. Introduction

This appeal presents the straightforward issue of whether Ronnoco overpaid Missouri use tax under sections 144.696 and 144.190[1] on its purchases from out-of-state vendors of certain coffee brewing and grinding equipment that it provided for consideration to its customers for their use (L.F. 126).[2] The taxability of Ronnoco's sales are not at issue since this

[1] Unless otherwise indicated, all statutory references are to the 2000 Revised Statutes of Missouri.

[2] The tax periods at issue ("Tax Periods") are January 1998 through September 2002 (L.F. 134).

case neither involves an assessment on Ronnoco's sales nor a refund claim for any tax remitted on sales.[3]

Ronnoco did not use the coffee equipment; rather, it provided the equipment to its customers for their use in grinding coffee beans or brewing coffee or tea (L.F. 58, 70, 127). The consideration that Ronnoco received for granting that use was the continued purchase of Ronnoco's coffee and tea products from Ronnoco. *Id*. The price that Ronnoco charged for the coffee or tea products reflected the cost to Ronnoco of the equipment. The more expensive the equipment that Ronnoco's customers chose, the higher the price Ronnoco charged for the coffee or tea products (L.F. 59, 71, 129). Once Ronnoco's customers ceased buying the coffee or tea products from Ronnoco they were required to return the equipment (L.F. 59, 71, 128-9). Thus, Ronnoco's sales were bundled sales consisting of coffee and tea products and the use of the equipment.

Although the taxability of Ronnoco's sales are not at issue, Ronnoco collected and remitted sales tax on its bundled sales (of coffee and tea products and equipment) unless Ronnoco's customers presented Ronnoco with claims of exemption (L.F. 59, 129). During the Tax Periods, approximately

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[3] While Ronnoco's sales of the equipment at issue could be deemed "loans" (as they are denominated in written contracts), "leases," "rentals" or some other term used to define "sale" under section 144.605(7), Ronnoco's purchases of the equipment at issue were outright purchases of tangible personal property. For this reason, Ronnoco disputes the Director's assertion in the Jurisdictional Statement (Dir. Br. 8) that "[t]he principal question posed on appeal is whether Ronnoco's contracts with its customers are 'leases' as the word is used in §144.020.1(8)[.]"

ten percent of Ronnoco's sales involving such equipment were to customers that presented no claim of exemption to Ronnoco and were charged sales tax by Ronnoco on the bundled sales to them (L.F. 73-4, 129). The remainder of such sales were to customers that sold the resultant liquid coffee/tea products at retail and collected sales tax on those sales. Because the Director's statement of facts (Dir. Br. 12) reflects these facts, Ronnoco is at a loss to understand why the Director would claim (Dir. Br. 34) that Ronnoco elected not to collect tax on its sales (the Director characterizes Ronnoco's sales as equipment "rentals").

Ronnoco overpaid use tax on its purchases of equipment because those purchases are both excluded and exempt from Missouri use tax in that they are purchases for resale within the meaning of sections 144.605, 144.615(6) and 144.610, as interpreted by this Court and the Court of Appeals, and such exclusion is consistent with the reasonable expectations of the General Assembly to avoid multiple taxation.

Section 144.610.1 imposes the use tax "for the privilege of storing, using or consuming" tangible personal property in Missouri. A purchase for resale of such property is, however, ***excluded*** from the definitions of storage and use under section 144.605 and the dictionary definition of "consume," just as the Commission concluded (L.F. 134).[4] *See Kansas City Royals Baseball Corporation v. Director of Revenue*, 32 S.W.3d 560, 562 (Mo. banc 2000). In a rare exhibition of the "belt and suspenders" approach to legislation, the Missouri General Assembly

[4] To "consume" is "1: to do away with completely: DESTROY … 2 … b. USE UP[.]" MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 249 (10TH ed. 1993).

made its intent doubly clear when it also provided an ***exemption*** for purchases for resale. *See* section 144.615(6).[5]

A purchase is for resale when it is for "sale" within the meaning of section 144.605(7). *Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539 (Mo. banc 1994). That section defines "sale" broadly as:

> "any transfer, barter or exchange of the title or ownership of tangible personal property, or the right to use, store or consume the same, for a consideration paid or to be paid, and any transaction whether called leases, rentals, bailments, loans, conditional sales or otherwise[.]"

This Court distilled the definition to its three elements: (1) a transfer, barter or exchange; (2) of the title or ownership of tangible personal property or the right to use, store or consume the same; (3) for a consideration paid or to be paid. *Sipco*, 875 S.W.2d at 542.

Ronnoco clearly meets all three elements, none of which the Director disputes. Ronnoco (1) transfers to its customers (2) the right to use, store, or consume the equipment (3) for consideration in the form of continued purchases of coffee and tea products at prices reflecting Ronnoco's cost of the equipment provided. Because the purchases of equipment were both excluded and exempt from use tax, Ronnoco overpaid tax on those purchases and is entitled to a refund under sections 144.696 and 144.190.

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[5] Missouri's sales tax law excludes resales from the definition of "sale at retail" in section 144.010.1(10) but contains no separate exemption comparable to that found in the use tax law.

B. Controlling Precedent Confirms that Ronnoco's Purchases are for Resale

In *Brambles v. Director of Revenue*, 981 S.W.2d 568 (Mo. banc 1998), the taxpayer bought shipping pallets and leased them to Proctor & Gamble ("P&G"). P&G placed its soap products on the pallets, applied shrink wrap to the same, and shipped the resulting package to its customers, who were free to use the pallets or return them as they saw fit. There, this Court specifically rejected the Director's argument that the sales tax exclusion for resales found in section 144.010.1(8)'s definition of "sale at retail" (now section 144.010.1(10)) did not apply to leases of property for re-lease or re-rental. This Court relied on section 144.010.1(3), which provides that leases of property are to be taxed in the same manner as outright sales of property. This Court concluded that "to the degree that a lease would be a sale for resale if an outright sale had been made, section 144.010(3) requires that the proceeds from such a lease be excluded from gross receipts." *Id*. at 570.

In *Weather Guard, Inc. v. Director of Revenue*, 746 S.W.2d 657 (Mo. App., E.D. 1988), the taxpayer purchased insulation blowing machines from an out of state vendor and provided the machines to its customers (retailers of the insulation) under a "loan" or "rental" agreement that required the retailers to exclusively buy Weather Guard's insulation and exclusively use the machines to install Weather Guard insulation. *Id.*, 746 S.W.2d at 657-8. The Court of Appeals applied section 144.605's definition of "sale" and concluded that "it is obvious from § 144.605(5) [now section 144.605(7)] that a rental qualifies as a sale."

Each of the above cases applied the words of what is now section 144.605(7) and concluded that the statute clearly and unambiguously states that a resale includes the transfer for consideration of the right to use property whether that transfer is labeled a lease, a rental, a

bailment or a loan. The label is of no consequence since the transfer is still a "sale" and thus a "resale" for purposes of sections 144.615(6) and 144.605(10) and (13). Since Ronnoco transferred the right to use the equipment for consideration, that transfer is a sale and Ronnoco's outright purchases of the equipment are excluded and exempt purchases for resale.

C. Qualification for the Resale Exclusion and Exemption is Consistent With the Reasonable Expectations of the General Assembly

In *Sipco*, this Court recognized that both the sales and use tax laws contain exclusions and exemptions that eliminate taxation of the sale or use of property that is to be resold because those exemptions and exclusions "avoid multiple taxation of the same property as it passes through the chain of commerce from producer to wholesaler to distributor to retailer." *Id.* 875 S.W.2d at 541. In the case of those customers who do not provide claims of exemption to Ronnoco, Ronnoco collects and remits sales tax on its sales of the coffee/equipment to them. In the case of those customers who do provide claims of exemption[6] to Ronnoco, Ronnoco does not collect and remit sales tax, but those customers collect and remit sales tax on the resulting sales of their coffee and tea products made with such equipment (L.F. 74). Unless Ronnoco receives a refund of tax it remitted on its purchases of the equipment, multiple taxation results, a result inconsistent with the reasonable expectations of the Missouri General Assembly, particularly given its belt and suspenders effort to shield purchases for resale from taxation. *See* Section 621.193.

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[6] Contrary to the Director's various statements in her brief, including in her statement of facts (Dir. Br. 12), nothing in the record shows specifically what type of claim of exemption (whether for resale or otherwise) Ronnoco's customers made to Ronnoco.

Furthermore, *Weather Guard* has been the law since 1988 and its rationale was reaffirmed by this Court's decision in *Brambles* in 1998. Sections 144.010, 144.020, 144.605(7) and 144.615 have all been amended at least once since 1998, and yet no amendment attempts to undo either *Weather Guard* or *Brambles*. That action is significant, for it shows that the General Assembly accepts these rulings. *Eighty Hundred Clayton Corporation, d/b/a Tropicana Lanes v. Director of Revenue*, 111 S.W.3d 409, 411, n.3 (Mo. banc 2003).

2. None of the Director's Arguments has Merit

The Director does not dispute any of the foregoing. Consequently, this Court could end its analysis here. However, the Director makes several erroneous and irrelevant arguments in an attempt to avoid the plain language of the statutes. In particular, notwithstanding the clear and unambiguous definition of "sale," the Director offers an array of arguments that the use tax resale **exemption** does not apply. The Director offers no separate attack regarding the resale **exclusion** under the use tax law. While both the exemption and the exclusion rely on a determination that Ronnoco resells the coffee equipment at issue, the exclusions are based upon the definitions of the words of the taxing statute and, as such, are to be strictly construed in favor of Ronnoco and against the Director. *Six Flags*, 102 S.W.3d at 529. The Director's arguments are contrary to the statutes and the cases construing them, and should be rejected.

A. Section 144.020.1(8) is Irrelevant (Responds to Point I, A-C)

The Director wrongly argues that section 144.020.1(8) controls. That paragraph provides:

> 1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state … as follows:

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(8) A tax equivalent to four percent of the amount paid or charged for rental or lease of tangible personal property, provided that if the lessor or renter of any tangible personal property had previously purchased the property under the conditions of "sale at retail" as defined in subdivision (8) of section 144.010 and the tax was collected at the time of purchase, the lessor or renter shall not apply or collect the tax on the subsequent lease or rental receipts from that property.

(i) Section 144.020.1(8) Does Not Apply to the Use Tax and Does Not Apply To Outright Purchases of Tangible Personal Property

Section 144.020.1(8) clearly and plainly does not apply for two reasons. First, the purchases at issue herein are from out-of-state vendors and subject to the use tax if subject to tax at all. Section 144.020.1(8) is a sales tax provision clearly intended to apply to in-state sellers for the "privilege of engaging in business" in Missouri. Second, section 144.020.1(8) applies to the taxability of leases and rentals. Whether Ronnoco's transfers to its customers of the right to use the equipment are deemed loans or leases, Ronnoco acquired the equipment by outright purchase from out-of-state vendors. Ronnoco's in-state sales are simply not at issue in this appeal.[7]

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[7] While the Commission correctly concluded that section 144.020.1(8) was inapplicable (L.F. 144), its reasoning was not advanced by Ronnoco. The Commission concluded that Ronnoco's transfers of equipment were loans as designated in the loan agreements and also concluded that even if they were rentals or leases, Ronnoco could not have collected sales tax

Furthermore, even if the Missouri Sales Tax Law, rather than the Missouri Use Tax Law, applied, the relevant statute would be section 144.020.1(1), which imposes sales tax on "every retail sale in this state of tangible personal property[.]" But if Ronnoco's purchases of the equipment were from Missouri vendors, the purchases would not be "at retail" because they would have been for resale to Ronnoco's customers. *See* Sections 144.010.1(3) and (10), and *Brambles*.

(ii) Even if Section 144.020.1(8) Were Relevant, the Director Misreads The Statute

Section 144.020.1(8) is plainly a taxing provision that should be strictly construed against the Director and in favor of taxpayers. Section 136.300.1; *Six Flags*, 102 S.W.3d at 529. Nevertheless, the Director tries to turn that statute on its head in an effort to defeat the use tax law's express exclusion and express exemption for purchases of property that are resold. This Court should resist the Director's efforts to alter the terms of the law.

Distilled to its essence, the Director argues (Dir. Br. 21-26) that a ***sales tax*** provision that plainly applies to the taxability of leases, in a backhanded way trumps not only the sales tax resale exclusion, but also both the ***use tax*** exclusion and the ***use tax*** exemption for outright purchases for resale because, in this case, the taxpayer paid tax on its purchases. Distilled even

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on the transfers of use because there was no separate charge for them. As to whether the transfers were loans or rentals, Ronnoco takes no position because either qualifies as a "sale" and thus a "resale." As to whether Ronnoco charged for the use of the equipment, clearly Ronnoco did, although the charge was part of its bundled price for coffee products and equipment.

further, the Director's argument is that a taxpayer is subject to tax on its purchases because it paid tax on its purchases (L.F. 24). Ronnoco assumes that the Director does not endorse the corollary to her theory that a taxpayer can avoid taxation by merely refusing to pay.[8] Is that the tax policy that the General Assembly intended? Of course not.

The Director's argument is contrary to *Brambles*. There, Brambles collected sales tax on its rental of pallets to P&G, but was entitled to claim the resale exclusion, and thus a refund of that tax because P&G's rental was for re-rental to its customers. This Court so concluded even though the taxpayer had collected the tax from P&G. Nothing in the Missouri sales tax law provides that a taxpayer becomes liable for an overpaid tax on account of the overpayment in the first place. Indeed, section 144.190's and section 144.696's authorization to recover overpaid tax evidences a legislative intent directly contrary to the Director's argument. The fact that a taxpayer overpaid tax in the first place has no bearing on whether the tax is actually due.

It should be noted that P&G's customers were retailers, who like some of Ronnoco's customers, undoubtedly provided claims of exemption to P&G. If the Director has issue with the taxability of ***sales*** to customers making claims of exemption/exclusion, whether P&G's sales to its retail customers or Ronnoco's sales to its retail customers, she is required to address that issue with the customers providing those claims of exemption. *See* Section 144.210.1 (imposing the tax on the buyer who makes an improper claim of exemption). *See* also Section

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[8] Predictably, the Director does not accept the ramifications of her theory. In a companion case, *Ronnoco Coffee Company v. Director of Revenue*, No. SC86912, the Director did indeed assess Missouri sales and use tax on Petitioner's purchases of such equipment.

32.200, art. V.2 (vendor relieved of liability for tax when accepting claim of exemption in good faith).

The Director argues that leases and the resale exclusion are mutually exclusive under Missouri law (Dir. Br. 19). That argument is erroneous. First, *Brambles* (for sales tax) and *Weather Guard* (for use tax) directly contradict that assertion. Second, the argument flies in the face of the words of the statutes defining the resale exclusions and exemption and the goal of the resale exclusion/exemption to prevent multiple taxation. *Sipco*, 875 S.W.2d at 541.

The Director reads section 144.020.1(8) as if it addressed both the taxability of rentals/leases and the taxability of outright purchases of property for rental/lease. By its plain terms, however, section 144.020.1(8) addresses the taxability of rentals/leases. Absent a tax exemption or exclusion, rentals/leases are subject to tax unless tax was paid at the time the rented or leased property was acquired, in which case the rentals are not taxable. The purpose of the sales tax "option" recognized by the Director (Dir. Br. 21), derives from the interplay between the resale exclusion in sections 144.010.1(3) and (10), and (*Brambles*), and section 144.020.1(8)'s prior payment exclusion. The option does not derive entirely from section 144.020.1(8), as the Director assumes. As explained above, if not for the resale exclusion in sections 144.010.1(3) and (10), section 144.020.1(1) (not section 144.020.1(8)) would impose sales tax on outright purchases from in-state vendors of tangible personal property (including property that will later be rented or leased).

The Director argues (Dir. Br. 21) that taxpayers cannot invoke the sales tax resale exclusion and section 144.020.1(8)'s prior payment exclusion simultaneously. While this is true, it is irrelevant to this case because this is not a sales tax case and because Ronnoco charges sales tax on its sales, including the transfer of the right to use the equipment, unless its customers

make a claim of exemption. But if Ronnoco's purchases were in-state purchases (which they are not), and if section 144.020.1(8) applied to Ronnoco's outright purchases of the equipment (which it does not), Ronnoco would not be required to ***both*** pay the tax on its purchase and collect tax on its non-exempt transfers of the right to use the equipment. Because that is the factual situation, even if section 144.020.1(8) applied, Ronnoco would be entitled to elect which of the overpaid taxes to recover since, as the Director concedes, it is the outright purchaser of the equipment that has the option (Dir. Br. 21).

The Director cites *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999) and *Six Flags*, but they do not support the Director's assertion. In each case, the taxpayer had paid tax when it acquired the tangible property and charged tax when it leased or rented the property. In each case, this Court concluded that the taxpayer could recover the overpaid tax on the subsequent rental. In each case, this Court recognized the goal of taxing property once and only once. *Six Flags*, 102 S.W.3d at 530; *Westwood*, 6 S.W.3d at 889. In neither case did this Court conclude that the taxpayer had no right to elect which of two overpaid taxes it could recover. Indeed, the dissent in *Six Flags* appears to state a preference for the option chosen by Ronnoco.

Although the Director does not make the argument, in *Westwood Country Club*, this Court determined that a resale must be a taxable resale in order to qualify for the resale exclusion. Because Westwood's sales of meals were not subject to tax, those resales of the food and drink did not qualify it to buy its food and drink tax-free. But this Court was careful to distinguish that decision from *McDonnell Douglas Corp. v. Director of Revenue*, 945 S.W.2d 437 (Mo. banc 1997), holding that the resale exclusion applied to subsequent resales that were subject to tax even if no tax was collected on the resales because the resales were exempt sales to the federal

government. This Court stated that "where aircraft are sold to non-exempt entities, of course a sales or use tax is to be collected on the sale of the final product." *Id*. 6 S.W.3d at 887. ***It is undisputed that Ronnoco charges sales tax on its sales, including its rentals, unless its customers provide claims of exemption*** (L.F. 129). For ten percent of Ronnoco's sales, its customers did not present claims of exemption and Ronnoco collected and remitted sales tax (L.F. 129). Ronnoco collected no tax on the remainder of its sales only because those customers, like the federal government in *McDonnell Douglas*, made claims of exemption. Ronnoco never treated its equipment rentals as excluded from tax, as is obvious from its tax collections on sales to customers claiming no exemption. This case is no different than *McDonnell Douglas* on that point. Because Ronnoco's transfer of the use of the equipment is subject to tax and, in fact, Ronnoco collected and remitted tax on such non-exempt transfers, no credible argument can be advanced that Ronnoco's purchases were disqualified from the resale exclusions under *Westwood Country Club*.

The Director argues (Dir. Br. 21-22) that section 144.070.5 evidences an intent to exclude leases from eligibility as resales. However, the basis for her claim is unclear. First, section 144.020.1(1) expressly taxes retail sales of motor vehicles, trailers, boats and outboard motors as sales of tangible personal property. Second, section 144.020.1(8) provides that the purchase, rental or lease of motor vehicles, trailers, boats and outboard motors shall be taxed under section 144.020 and 144.070. Section 144.070 also addresses the tax on motor vehicles, trailers, boats and outboard motors. The part of section 144.070.5 that the Director cites merely reflects that tax can be paid under section 144.020 or 144.070. Section 144.070.5 is irrelevant because it does not address the issue in this case. Furthermore, nothing in section 144.070 shows an intention contrary to that expressed in section 144.020.1(8) that "[t]angible

personal property which is exempt from the sale or use tax upon a sale thereof is likewise exempt from the sales or use tax upon the lease or rental therof."

The Director cites *International Business Machines Corp. v. State Tax Comm'n*, 362 S.W.2d 635 (Mo. 1962) and *Federhofer, Inc v. Morris*, 364 S.W.2d 524 (Mo. 1963) for the proposition that rentals were not historically subject to sales tax as "sales at retail." The Director thus reasons that rentals are not considered "sales" for purposes of determining applicability of the resale exclusions and exemption under current law (Dir. Br. 29-33). Rentals are now subject to sales tax under section 144.020.1(8) while rentals from an out-of-state vendor are subject to Missouri use tax as "sale[s]" under section 144.605(7) if the rentals are for use in Missouri. *See Brambles* and *Weather Guard*. There can be little doubt that, absent an exclusion or exemption, the Director expects use tax to be remitted on such rentals from out-of-state vendors. What is good for the goose is good for the gander. If a rental is a sale for purposes of taxability, it is a sale for purposes of determining entitlement to the resale exclusions and exemption.

The Director also advances certain policy arguments (Dir. Br 24-25) that by judicially depriving taxpayers of the right to elect which of two overpaid taxes to recover, the Court will be preventing "mischief." That is an interesting assertion given the Director's mischievous position to retain both the tax paid by Ronnoco on the purchases of equipment and the tax Ronnoco collected and remitted on its transfer of such equipment to its customers not claiming exemption. The "mischief" about which the Director objects is apparently the goal of taxing property once and only once. Furthermore, as explained above, when a taxpayer seeks a refund of tax overpaid on the purchase of property subsequently rented, it is still incumbent on the taxpayer to show that the subsequent rental is subject to tax. *See Westwood*, 6 S.W.3d at 887-8. Likewise, when examining the taxability of the vendor's rentals of the property, section

144.020.1(8) requires the vendor to show that it paid the tax at the time of purchase. Under any reasonable reading of the statute, that showing cannot be made if that tax had been refunded. Here, it is undisputed that Ronnoco charges sales tax on its bundled sales unless it receives a claim of exemption.

B. Section 144.615(6) Applies (Responds to Point I(D))

The Director argues (Dir. Br. 33-5) that the Commission "impermissibly applied" the express resale ***exemption*** in sections 144.615(6) and 144.605(7) when it should have given section 144.020.1(8) the convoluted and unsupported construction that the Director advanced and, citing *House of Lloyd, Inc. v. Director of Revenue*, 884 S.W.2d 271, 274 (Mo. banc 1994), superimposed that construction on the use tax law. As a preliminary matter, and contrary to the Director's claims (Dir. Br. 33, 35), the Commission never held that section 144.615(6) "trumped" section 144.020.1(8). The Commission rightly concluded that section 144.020.1(8) simply did not apply (L.F. 144).

As explained above, the Director's construction of section 144.020.1(8) is erroneous. It simply does not apply, and if it did, it is entirely consistent with section 144.615(6). In any event, the Director misreads *House of Lloyd*, a case that coincidently addressed the use tax exemption for resale. One issue in *House of Lloyd* was whether packing materials in boxes of the taxpayer's products shipped to its customers were resold to customers. The parties disputed whether the taxpayer "sold" the packing materials since those materials benefited the taxpayer by protecting its products prior to the transfer of title to its customers. This Court noted that section 144.615(6)'s exemption for resale was narrower than the sales tax resale exclusion because the use tax exemption included the words "held solely for resale." But this Court did not, as the Director implies, rewrite the sales tax exclusion to make it narrower. Rather, this

Court expanded the use tax exemption by finding that the exemption was not vitiated if the taxpayer received any benefit from holding the packing materials prior to shipment. Thus, even if the sales tax code were narrower than the use tax code in defining resale (which it is not), this Court has historically resolved such differences in favor of the taxpayer, consistent with the canons of construction.

The Director claims that by equating "resale" with "sale" as defined in section 144.605(7) and considering that section's express inclusion of "rentals" and "leases" within the definition of sale, that various words of section 144.020.1(8) are rendered meaningless (Dir. Br. 34). The Director does not identify the words about which she makes this assertion, although one may presume her focus is on the words "under the conditions of sale at retail." However, as the facts show, those words are not rendered meaningless. Ronnoco both paid use tax at the time it purchased the equipment and, absent a claim of exemption by a customer, collected sales tax on its transfer of the right to use the equipment. If Ronnoco had purchased the equipment in Missouri, the purchase would not be a "sale at retail" because Ronnoco resells the equipment to its customers and collects and remits sales tax on the resale unless a claim of exemption is made. Under the sales tax law, if it applied, Ronnoco would not owe sales tax under section 144.020.1(1) because its purchase was an excluded purchase for resale under sections 144.010.1(3) and (10). *See Brambles*. However, if Ronnoco did not claim the resale exemption, but rather claimed the prior purchase exclusion in section 144.020.1(8), its purchase of the equipment would be a sale at retail and taxable because the subsequent sale of the equipment was not taxable. *See Westwood*. No words of section 144.020.1(8) are rendered meaningless. A conflict would certainly arise if a taxpayer who paid both the tax at the time of

purchase and collected and remitted tax on the subsequent rental sought to recover both taxes. But that is not the case here.

Last, the Director argues (Dir. Br. 35-6) that Ronnoco seeks to "have it both ways" because it accepted claims of exemption from some of its customers and thus did not charge them tax. As explained above, the acceptance of claims of exemption on sales is irrelevant to the resale exclusion on purchases. In *McDonnell Douglas*, the taxpayer still qualified for the resale exclusion on its purchases even though it resold the property entirely to one exempt entity. And Ronnoco does not seek to have it both ways any more than any vendor does when the vendor accepts a claim of exemption from a customer. Undoubtedly, retailers like Wal-Mart accept claims of exemption from some of their customers. Does that mean that Wal-Mart should not purchase its sales inventory under resale certificates because it would have it "both ways?" If the Director has concern with the claims of exemption made by some of Ronnoco's customers, she is required by sections 144.210.1 and 32.200, art. V.2, to address such concerns with Ronnoco's customers who are making the claims of exemption.[9]

[9] As explained above, the record does not support the Director's assumption that Ronnoco's customers' claims of exemption were solely resale claims of exemption. The record provides merely that the customers made claims of exemption (L.F. 129). Moreover, when and if the Director would choose to explore this issue with those customers, they would have every right to show that their purchases were exempt under any theory. Section 144.210. For instance, the record here shows that Ronnoco sells to "resellers that resell to [businesses like law and accounting firms.]" (L.F 58-59, 71) (Dir. Br. 9). However, restaurant customers might establish that they

C. *Brambles* and *Weather Guard* Control (Responds to Point I(E))

The Director challenges the Commission's citation of the "factoring cases" because allegedly none of those cases involved leases or involved property that customers had to return (Dir. Br. 36-37). *Brambles* and *Weather Guard* represent such cases. In *Brambles*, this Court expressly applied the factoring analysis to find the consideration for a sale ("It is assumed … that the price of the pallets was factored into the purchase price of the soap and that, therefore, P&G received consideration for those pallets"). *Brambles*, 981 S.W.2d at 571. Weather Guard's customers ultimately ***were required to return*** the insulation blowing equipment. Furthermore, the Court in *Weather Guard*, 746 S.W.2d at 658, expressly relied on what appears to be the first factoring case, *King v. National Super Markets, Inc*., 653 S.W.2d 220 (Mo. banc. 1983).

Again focusing on the wrong transactions, Ronnoco's sales rather than its purchases at issue, the Director expands on her assumption that Ronnoco's customers claims of exemption were only for resale, and opines that grocery stores might claim that their shopping carts were purchased for resale since their customers use the same and the cost of the carts is factored into the purchase price of food (Dir. Br. 37). But that is basically what this Court concluded in what appears to be the first factoring case, *King*, where this Court found that the grocery bags were resold because their cost was factored into the purchase price of food. And equipment that is used to manufacture food and drink products, whether it be coffee grinding and brewing equipment or a bakeries' ovens, would appear to be precisely the type of equipment that

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use the coffee grinding and brewing equipment to manufacture liquid coffee upon which they collect and remit sales tax.

customers should buy under claims of exemption. That is especially true for entities that are producing products upon which they ultimately collect and remit substantial sales tax for the Director.

The Director asserts that neither this Court in *Brambles* nor the Court of Appeals in *Weather Guard* considered section 144.020.1(8) (Dir. Br. 38-40). They did not do so, nor did counsel for the Director in those cases, because section 144.020.1(8) is simply inapplicable. But simply because this Court and the Court of Appeals did not consider an irrelevant statute does not mean that *Brambles* and *Weather Guard* are not controlling. They are controlling, just as the Commission concluded.

D. Ronnoco Resells the Equipment; Ronnoco Does Not Otherwise Use or Consume It (Responds to Point II)

The Director's argument in Point II highlights the fact that the taxability of Ronnoco's sales really are not at issue, although the Director's brief seems to focus on them. Uncharacteristically, the Director claims that a taxpayer's "sales" of equipment are not taxable because Ronnoco uses the equipment to provide a "non-taxable service" (Dir. Br. 41). The Director describes the "nontaxable support service" as "providing its customers with the ability to have freshly-ground and –brewed coffee on demand" (Dir. Br. 43). This argument is a mischaracterization of the transactions at issue, and was not raised by the Director before the Commission for good reason. It is contrary to the Commission's finding of fact ¶ 4 (L.F. 127-8), which the Director does not overtly challenge, contrary to the sworn testimony in affidavits (L.F. 58, 70), and contrary to Missouri law.

The undisputed facts show that Ronnoco transferred the right to use the coffee equipment to its customers for consideration. The undisputed facts show that Ronnoco did not use the equipment. Ronnoco did not grind coffee beans, or brew coffee or tea at its customer's premises; its customers did that. It is at best a stretch to take those facts and translate them into the statement that Ronnoco "tak[es] care of its customer's every service and maintenance need," thus implying that Ronnoco used the coffee brewing and grinding equipment at their customers premises (Dir. Br. 43).[10]

The Director cites the "true object" test in *Sneary v. Director of Revenue*, 865 S.W.2d 342, 345 (Mo. banc 1993). The Director's reliance on the true-object cases misses the mark because the true object of the transactions clearly is both the equipment and the coffee/tea products. The record is clear that the cost of the equipment is factored into the price of the coffee and tea (FF ¶8, LF 129). If Ronnoco's customers did not want the equipment, then why were they paying extra for it and using it? Indeed, the record shows that some customers do not take coffee equipment because they "want to negotiate a lower price for the coffee beans, ground coffee and tea" (L.F. 73, 129).

The Director also argues that the equipment could not have been the true object for those customers who provided claims of exemption to Ronnoco (Dir. Br. 45). The fact that

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[10] Having ignored the record on this point, the Director refers the Court facts outside of the record, facts that are apparently the result of the Director's counsel's internet search (Dir. Br. 43). These results do not support the Director's argument in any event, and Ronnoco objects to this violation of appellate procedure. *See Browning-Ferris Industries of Kansas City, Inc. v. Dance*, 671 S.W.2d 801 (Mo. App., W.D. 1984).

some of Ronnoco's customers provided claims of exemption to Ronnoco shows nothing more than that those customers claimed that their bundled purchases of coffee/tea products and equipment were exempt. The claims of exemption do not show that the claimants were uninterested in the equipment any more than it shows that they were uninterested in the other aspects of the bundled sale -- the coffee and tea products.

Last, while giving inadequate consideration to Missouri precedent, the Director cites cases from Connecticut and New York that are not controlling or even relevant. In *Sanitary Services Corp. v. Meehan*, 665 A.2d 895 (Conn. 1995), the court determined that waste containers that a trash collection provider placed at its customers' premises were not rented to customers because, factually, trash collection was the true object of the transaction. In *Atlas Linen Supply Co., Inc. v. Chu*, 540 N.Y.S.2d 347 (N.Y. App. Div. 1989), the court determined that clean linens that a laundering service provided to its customers were not rented to customers because, factually, laundry service was the true object of the transaction. Both cases were decided on their facts, and in both cases, the service at issue appeared to be nontaxable. By contrast, Ronnoco agrees that its sales are taxable unless its customers make claims of exemption, and it is clear that Ronnoco's customers do bargain for the equipment or they would not be paying for it. Indeed, the Director concedes that the "coffee equipment … is of more than negligible value" (Dir. Br. 44).

E. All of Ronnoco's Equipment Was For Resale (Responds to Point III)

The Director's final point seizes upon the fact that a small part of Ronnoco's equipment purchases were of equipment that Ronnoco sold outright to its customers, as opposed to transferred under the "loan" agreements, and that the "evidence" does not identify which purchases at issue were transferred in that manner (Dir. Br. 46-7). As explained above,

however, Ronnoco purchased all of the equipment (not just the small amount sold outright) for resale, just as the Commission found. Moreover, even if that were not the case, the Director misplaces her "strict proof" argument. This case was not decided either on a stipulation of facts or a trial. This case was decided on cross "motions for summary determination" under Regulation 1 CSR 15-3.440(3) (L.F. 45-99, 127)(included in Appendix), the Commission's version of this Court's Rule 74.04. Under that summary judgment standard, if there is a dispute as to a material fact, no summary judgment is to be entered and the case is remanded to the trial court for further proceedings. *See Channing v. Brindley-Sullivan Inc.*, 855 S.W.2d 463, 464 (Mo. App., E.D. 1993)("We reverse and remand because a material issue of fact remains in dispute").

The Director's position under Point III is thus erroneous as a matter of fact, law, and procedure.

CONCLUSION

Based on the foregoing, this Court should affirm the Commission's decision.

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed first class, postage prepaid or hand-delivered this _____ day of October, 2005, to Alana Barragan-Scott, Assistant Attorney General, Missouri Attorney General's Office, P.O. Box 899, Jefferson City 65102.

I hereby certify that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 7,149 words.

The undersigned further certifies that the disk simultaneously filed with the hard copies of the briefs has been scanned for viruses and is virus-free.

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